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Re: S. 9 in House Committee on Human Services, House Committee on Judiciary and House Committee on Government Operations

Rep. Ann Pugh, Chair: House Committee on Human Service
Rep. Maxine Grad, Chair: House Committee on Judiciary
Rep. Donna Sweaney, Chair: House Government Operations Committee

March 25, 2015

Dear Chairpersons Pugh, Grad and Sweaney:

I am an attorney who has represented Vermont school districts throughout the State for almost 30 years. In my experience during this time, the daily efforts of teachers, administrators and other school staff reflect, first and foremost, their commitment to keeping children safe, including strict adherence to the law as mandatory reporters of suspected child abuse under 33 V.S.A. §4913.

I write this letter to express serious concerns about the provision in S.9 proposing an amendment to Title 13 by adding Sec.1304a, to establish a new crime of "failure to protect a child". While the intent of Section 1304a to protect children from harm is laudable, I believe the bill as drafted has flaws that will lead to problems with interpretation, compliance, and enforcement.

Below is a brief outline of concerns about the Section 1304a. If it would be helpful, I would like to provide more detailed testimony about this proposed legislation to the appropriate committee.

Overbreadth. According to language in the preamble to S.9, a primary purpose of the bill is to respond to tragic circumstances that resulted when the current child abuse prevention system did not work. Section 1304a, however, goes far beyond an intent to address that problem. It is not apparent from Section 1304a's terms what particular behavior it is designed to require or prohibit; what type or types of circumstances the statute is intended to address; what person or categories of persons are the intended targets of the criminalizing of the "failure to act" behavior; what type(s) of action are required of such persons to avoid prosecution; and what type of danger of death or seriously bodily injury is contemplated by the law.

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Lack of Intent. Section 1304a does not prohibit intentional wrongdoing, which is typically the critical element in defining a criminal act. Rather, it creates a duty for persons to decide whether a child is “in danger of” death and other forms of harm, and, if they “know or should have known” that the child was “in danger,” subjects them to liability for a felony punishable for up to 10 years of imprisonment, if they fail to act to prevent the harm. Absent the element of intent, the provision arguably creates a broad, new and ill-defined duty of care that in some circumstances would exceed even the civil duty of care, and then subjects a person who fails to take ill-defined preventive action to criminal liability for a felony.

Child Abuse Reporting. To the extent that Sec. 1304a addresses the same types of harmful behaviors that are sought to be prevented by the child abuse reporting mandates under Subchapter 2 of Title 33 of the Vermont Statutes, it is duplicative and unnecessary.

The child abuse reporting law has been in place and relied on for decades as a means for school personnel (and other specifically enumerated reporters) who have reasonable cause to believe that a child is being abused or neglected by a person responsible for the child’s welfare, to report it within 24 hours to the Commissioner for children and families or his/her designee. The concepts of abuse and neglect in the mandatory reporting law are defined by statute, and include (as well as others) the types of harm listed in Section 1304a -- death, serious bodily injury, being subjected to lewd or lascivious conduct, sexual exploitation or sexual assault.

Notably, teachers and most mandatory reporters (with the exception of law enforcement officers), have no authority to take “action” beyond making the report to proper authorities, where the person who is the subject of the report is a parent or other third party over whom the reporter has no contractual or other legal control.

The existing child abuse reporting statute includes definitions of its operative terms. It provides protection for mandated reporters by providing immunity from civil and criminal liability which might otherwise be incurred/imposed as a result of making the report in good faith. It provides for penalties including fines and imprisonment (for a misdemeanor) for violation of the law by a mandatory reporter. Section 1304a, on the other hand, provides no protections for persons attempting to comply with its ambiguous duty to protect, but apparently would make even a negligent failure to report or other negligent failure to act a felony punishable by up to 10 years of imprisonment.

These facts give rise to the question: with respect to people who are mandated reporters, what is Section 1304a supposed to accomplish that is not already

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accomplished by the mandatory reporting law?

Vagueness and Ambiguity. The essential elements of the crime created by Section 1304a are not defined. The key terms “person,” “having...care of a child,” “in danger of,” “or reasonably should have known” and “failure to act to prevent” are all overbroad, vague, and ambiguous.

“Person”. It is unclear what persons or categories of persons are the intended focus of the proposed statute.

“Having ... care of a child”. What degree of responsibility for a child is required for a person to “have care of a child” under the proposed statute?

“In danger of”. What degree of certainty is necessary for a person to have “knowledge”, actual or imputed, that a child is “in danger of” death or lewd and lascivious conduct? How imminent does the danger need to be? Does the act/event putting the child in danger have to be occurring in the “person’s” presence in order for the person to have knowledge? Is the danger of death or serious bodily harm restricted to such dangers at the hands of a third party who intends the harm, or can the “person” become responsible under statute for accidents involving the child?

“Know or should have known”. To what degree must the “person” speculate as to the existence of the danger? Is the “person” allowed to exercise judgment in making the determination with respect to danger, without being subjected, in effect, to strict criminal liability if the harm occurs? What if the “person” has received some information, but does not have the authority to know (or to acquire knowledge of) the full facts, in order to conclude whether there is danger or not?

“Failure to act to prevent...” What is a sufficient “act”? If the person reports to proper authorities a reasonable suspicion that a child is in danger from a parent or other third party whose actions might result in death, serious injury or exposure to lewd and lascivious conduct or sexual assault, is that report a sufficient “act” under the statute? (The reporter is not present to intervene physically, and typically lacks the authority to investigate or take other preventive action.) If the “person” does act, but the action ultimately fails to prevent the harm, despite a good faith effort, is the “person” still subject to criminal prosecution under Section 1304a?

For these and other reasons, Section 1304a would be difficult to obey, difficult to enforce with fairness and consistency, and subject to challenges under the constitutional “void for vagueness” doctrine.

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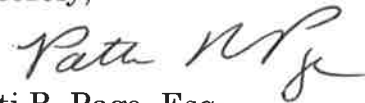
Unintended Outcomes. Diligent professionals caring for children will work under the fear that if they do not perceive a danger, or if they “act to prevent” but their action does not prevent the ultimate harm, they will be subject to criminal prosecution for a felony. Criminal statutes should focus on those who intentionally harm children; not on those who, in caring for them, may make a mistake or exercise good faith judgment that is later challenged. Civil statutes already provide for an appropriate duty of care, and provide civil causes of action in those rare instances where negligence occurs.

Where the person’s duty and authority to act is limited to making a report, the potential for facing felony charges for an ill-defined failure to act will inevitably result in over-reporting. Over-reporting does not result in safer children; to the contrary, it results in an even more over-burdened investigation and response system.

Please excuse the informality of this communication. I have only recently become involved with this piece of legislation, and I understand that time is of the essence.

Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Patti R. Page".

Patti R. Page, Esq.